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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 671

JOSEPH IRVING McMULLEN,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable Harlan Fiske Stone, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Joseph Irving McMullen hereby petitions for a writ of certiorari to the Court of Claims of the United States and in support thereof alleges as follows:

Jurisdiction.

The jurisdiction of this court is invoked under the provisions of 28 U. S. C. A. 288; 43 Stat. 939 as amended.

Statement of the Case.

Petitioner herein filed his petition in the Court of Claims of the United States, seeking to recover from the United States certain sums of money representing pay and allowance as a colonel with more than thirty years' service on

active duty in the Army of the United States, from May 9 to May 28, 1936, inclusive, and the additional sum of $375.00 a month from May 29 to the date of the filing of said petition as and for pay as a colonel on the retired list of the United States Army (R. 1). Issue was joined by the Government and on December 6, 1943, the lower court rendered judgment dismissing plaintiff's petition (R. 26). The salient facts are correctly set forth in special findings of fact made by the lower court (R. 6-18). The pertinent facts so found are as follows:

Plaintiff enlisted in the regular Army of the United States on April 11, 1896, and continued in active duty until September 20, 1906, when he was retired for physical disability in line of duty with the rank and commission of second lieutenant. From March 28, 1916, to July 19, 1916, he was recalled and served as a second lieutenant retired on active duty. On June 3, 1916, under the provisions of the act of March 4, 1915, plaintiff was restored to active duty as a first lieutenant and remained on active duty until the time hereinafter noted, being raised in rank from time to time until he reached the rank of colonel on November 1, 1932, and as such was stationed at Washington, D. C., in the office of Judge Advocate General (Special Finding No. 1, R. 7).

On June 6, 1935, an indictment was returned in the then Supreme Court of the District of Columbia charging petitioner with a violation of section 113 of the Criminal Code; Title 18, sec. 203, U. S. C. A. (Special Finding of Fact No. 8, R. 9).

Said section 113 of the Criminal Code reads as follows:

> "Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a depart-

ment, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

Title 18, sec. 203, U. S. C. A.; Criminal Code, sec. 113.

Petitioner was tried upon said indictment and convicted on April 30, 1936, and on May 8, 1936, was sentenced to imprisonment for a term of six months and fined $1,000.00. Petitioner immediately perfected an appeal to the United States Court of Appeals for the District of Columbia, and that court, on May 21, 1938, reversed the judgment and remanded the case for a new trial.

On June 30, 1939, a *nolle prosequi* was entered in petitioner's case in the District Court of the United States for the District of Columbia (Special Finding No. 8, R. 9).

On April 11, 1936, prior to petitioner's conviction as aforesaid, petitioner addressed a written communication through the Judge Advocate General to the Adjutant General, making application to be placed on the retired list with the rank of colonel, pursuant to the provisions of 10 U. S. C. A. section 942. (Special Finding No. 10, R. 10), which section provides as follows:

"When an officer has served forty years either as an officer or soldier in the regular or volunteer service, or

> both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list."

No affirmative action was ever taken on said application of petitioner to be placed on the retired list and the same was never laid before the President (Special Finding No. 14, R. 11). On May 28, 1936, Special Orders No. 127 in the War Department set out the following in printed form:

> "Announcement is made that by operation of section 203, title 18, United States Code, Colonel Joseph I. McMullen, Judge Advocate General's Department, ceased to be an officer of the Army on May 8, 1936" (Special Finding No. 12, R. 11).

On May 25, 1936, the President of the United States submitted to the Senate, for its advice and consent, the nomination of Lt. Col. James Howard Laubach to be colonel from May 14, 1936. This nomination was withdrawn by the President on May 30, 1936, and on said latter date the President again sent to the Senate the nomination of Lt. Colonel Laubach to be colonel from May 9, 1936, due to the separation of Colonel Joseph I. McMullen, Judge Advocate General's Department, as of May 8, 1936, from the Army through the operation of section 203, Title 18, United States Code (Special Findings Nos. 16 and 17, R. 11-12).

The Senate gave its advice and consent to the appointment of Lt. Colonel Laubach as colonel on June 8, 1936, and on June 17, 1936, the president executed a commission pursuant thereto (Special Finding No. 20, R. 12-13).

Petitioner's Contentions in the Lower Court and the Adverse Action of the Court of Claims.

Petitioner contended, among other things, in the lower court, that he was entitled to judgment for the following reasons:

1. That a conviction under section 113 of the Criminal Code did not immediately, or otherwise, remove him as an officer of the United States Army; that the punishment of imprisonment and fine and removal from office as provided for in said section were inseparable, and that when petitioner perfected his appeal the effect thereof was to stay the operation of all of the penal provisions of said section including the clause providing for disqualification to hold any office of honor, trust or profit under the Government of the United States; that upon the reversal of petitioner's conviction and the entry of the *nolle prosequi* in the trial court, the proceedings were as if they had never been instituted.

2. That when plaintiff made application for retirement for forty years service on April 11, 1936, he became an officer on the retired list as of that date; that under the retirement statute no discretion is vested in anyone, except the officer who has served forty years, as to whether such officer shall or shall not be retired; that no affirmative action on the part of the President or any officer of the War Department is necessary to carry into effect an application made under such statute; that in computing the time served under the forty year retirement statute, time served on the retired list as well as on the active list must be considered in the computation.

3. That the appointment by the President of Colonel Laubach and the Senate's confirmation of that appointment did not operate as a removal of petitioner from his office as colonel in the United States Army.

The Court of Claims rendered an opinion (R. 19) holding directly contrary to each of the foregoing contentions of petitioner and in so doing has committed grievous error.

Specification of Errors Relied On.

1. The Court of Claims erred in holding that the appeal by petitioner from the judgment pronounced on him by virtue of section 113 of the Criminal Code, while operating to stay the execution of the penal provision thereof providing for fine and imprisonment, did not operate to stay the penal provisions disqualifying petitioner from thereafter holding an office of trust or profit under the Government of the United States.

2. That the Court of Claims erred in holding that when petitioner was convicted of violating section 113 of the Criminal Code he immediately ceased to be an officer in the United States Army even though petitioner promptly perfected an appeal from the judgment pronounced on said conviction and said conviction was subsequently reversed by the Appellate Court.

3. That the Court of Claims erred in holding that in computing the time a person has served as a member of the regular Army under the forty year retirement statute, the time served as an officer on the retired list must be excluded.

4. That the Court of Claims erred in holding that in time of peace the President, with the consent of the Senate, can remove an officer of the United States Army by the appointment, confirmation and commissioning of another person to take such officer's place.

5. That the Court of Claims erred in holding that a person can be commissioned as an officer in the United States Army even though there be no vacancy in the list of officers of that rank to which such person was commissioned.

The Questions Presented.

The questions presented by this petition are as follows:

1. Are not the penal provisions of section 113 of the Criminal Code inseparable?

2. When one is convicted under section 113 of the Criminal Code and perfects an appeal from the judgment rendered on said conviction, does not the perfecting of said appeal under Rule 5 of the Supreme Court Rules of Practice and Procedure in criminal cases, stay the execution of the entire judgment including the disqualification clause?

3. When one has served for forty years as a soldier and officer of the regular Army of the United States is he not entitled to be retired from active service and placed on the retired list when he makes application therefor at the expiration of forty years, even though during a portion of said forty year period he was an officer on the retired list?

4. Since the revision in 1916 and 1920 of the statutes dealing with the Army (41 Stats. Chap. 227) and the amendment in 1920 of the 118th Article of War (41 Stats. 811), has the President any longer the power to dismiss an officer from the Army by appointing, with consent of the Senate, another to fill his place?

5. Is not the power of the President, with consent of the Senate, to commission a person as an officer of the Army limited in its exercise to where there is an actual vacancy to be filled by such appointment?

6. If, as a matter of law, petitioner was an officer on the retired list on the date that Lt. Colonel Laubach was ap-

pointed, confirmed and commissioned as a colonel on the active list, how could such action operate as a removal of petitioner as an officer on the retired list?

7. If the appeal of petitioner from his conviction under section 113 of the Criminal Code stayed the operation of the disqualifying clause thereof and if there were vacancies in the list of colonels to which Lt. Colonel Laubach could have been appointed, did the appointment of Lt. Colonel Laubach as colonel operate to oust petitioner?

8. Where the President and Senate erroneously believe that an officer has ceased to hold his office in the Army and, acting upon such erroneous assumption and belief, appoint another to such position, does such appointment operate to oust the person who in reality continued to hold such office.

Reasons Why the Writ Should Be Granted.

The writ of certiorari should issue in this case for highly important reasons. Not only are statutes involved which never before have been construed by the Supreme Court, but due to the increased personnel in our Army and the probability of such statutes being called into question on numerous occasions hereafter, a construction thereof by this court becomes most necessary. In particular this court should issue the writ for the following reasons:

a. The penal provisions of section 113 of the Criminal Code have never been construed by this court. As only persons holding office of trust and profit under the Government are amenable to these provisions it becomes necessary that it should be definitely decided whether all of the penal provisions operate in the conjunctive or whether one can be severed from the other. It is also necessary that there be a definite decision as to the effect of an appeal from a judgment of conviction rendered under this or any other statute

which carries with it a diversity of punishments all operating in the conjunctive.

b. That the Court of Claims decided a question of substance, to wit: that the penalties of section 113 of the Penal Code, of fine, imprisonment and disqualification to hold public office, although stated in the conjunctive, are severable; that such holding is directly contrary to the decision rendered in *Egan* v. *United States*, 287 Fed. 958.

c. That it is a matter of grave importance that this court determine whether in computing the forty years provided for in the retirement statute, the time served during that forty years as an officer on the retired list should be included or excluded in such computation.

d. That the decision of the Court of Claims to the effect that in computing the forty year period prescribed in the retirement statute, time served as an officer on the retired list must be excluded, is directly contrary to the holding of this court in *United States* v. *Tyler*, 105 U. S. 244, 245.

e. That the decision of the Court of Claims to the effect that an officer of the Army may be removed by the appointing, confirmation and commissioning of another officer to take his place, is contrary to the ruling of this court in the case of *Wallace* v. *United States*, 257 U. S. 541.

f. That the decision of the Court of Claims to the effect that one can be commissioned an officer in the United States Army where no vacancy exists in the list of officers of such grade, is contrary to the holding of this court in the case of *Wallace* v. *United States*, 257 U. S. 541.

g. That the statutes of the United States relating to the Army, including the 118th Article of War, have all been revised and amended beginning with the year 1916. Neither this nor any other federal court has construed such

amended statutes in so far as they pertain to the power of the President, with advice and consent of the Senate, to remove an officer of the Army by the mere appointment of another to take his place. That even though prior to 1916 such power was vested in the President (as was held in the case of *Blake* v. *United States*, 103 U. S. 327) such power no longer is vested in the President by virtue of said amendments. Whether the President has the power is a matter of grave importance and the statutes as amended should be construed by this court and the question definitely decided.

h. No decision has ever been rendered by this or any other federal court construing the forty year retirement statute in the following particulars: (1) does such statute vest in the officer seeking retirement the sole right of exercising the privilege of retirement under the statute; (2) is discretion vested in either the President, Secretary of War or any other officer, to disallow an application for retirement under the forty year statute, providing the person has served the forty prescribed years and is not otherwise disqualified from remaining as an officer of the United States Army. These are matters of vital importance to all officers in the Armed Forces of the United States and a decision on this point should be rendered by this court.

i. That each of the matters passed upon in the opinion of the Court of Claims is an important question of general law and decided in a way untenable and in conflict with the weight of authority.

For the reasons herein stated petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the Court of Claims of the United States to the end that

the questions involved may be fully presented and argued and justice done in the premises.

Dated at San Francisco, California, January 31, 1944.

Respectfully submitted,

LEO R. FRIEDMAN,
Attorney for Petitioner.

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
Of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for petitioner in the above entitled cause and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated at San Francisco, California, January 31, 1944.

LEO R. FRIEDMAN,
Attorney for Petitioner.